No. 12,191

IN THE

United States Court of Appeals

For the Ninth Circuit

PHILIP NELSON,

Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD. (a corporation), and UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLEE AMERICAN PRESIDENT LINES, LTD.

TREADWELL & LAUGHLIN,
EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California,
Proctors for Appellee, American President Lines, Ltd.

CHARLES M. HAID, JR.
Mills Building, San Francisco 4, California,
Of Counsel

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

STATEMENT OF THE CASE.

The S. S. RUTH ALEXANDER, owned and operated by Appellee, American President Lines, Ltd., opened shipping articles on October 21, 1941, covering a voyage from San Francisco westward to Manila and other trans-Pacific ports, and return to a Pacific Coast port of discharge. The vessel sailed from San Francisco and arrived at Manila on December 9, 1941. War between the United States and Japan broke out on De-

cember 7, 1941, and the vessel departed from Manila on December 28, 1941, en route to Australia, or any other safe place of refuge. On December 31, 1941, while proceeding through the Macassar Straits, the vessel was bombed and sunk by a Japanese plane. The crew members took to the life boats and were, on the same day, rescued by a Dutch seaplane which took them to Tarakan, Borneo. All the crew members, including Nelson, remained in Tarakan for about one day, and were then flown to Balikpapan, Borneo, where they remained another day. They were then taken by steamer to Soerabaya, Java, arriving about January 4, 1942. They remained in Soerabaya until about January 24, 1942, when all except Nelson departed by steamer and were repatriated to the United States, arriving during February 1942. From the time of his arrival in Soerabaya about January 4, 1942, until about January 18, or 19, 1942, Nelson was quartered in a rooming house with other crew members. He was then hospitalized in Soerabaya, and was unable to travel and leave with the others. The Japanese entered Java in March 1942, and Nelson was thereafter interned by the Japanese until September 1945, at which time the island was liberated and Nelson was repatriated to San Francisco, by way of New York, during October 1945.

After Nelson's arrival in San Francisco he was paid the net sum of $3,937.65, this amount including wages of $4,016.25 for the period January 1, 1942 to October 27, 1945, inclusive, at $87.50 per month, plus $6.40 as bonus during repatriation, plus

$125.00 for transportation from New York to San Francisco, plus $150.00 for loss of personal effects, less $360.00 for prior advances.

II.

ISSUES.

Appellant seeks recovery against Appellee American President Lines, Ltd. of the following:

1. War bonus, in the amount of $3,600.00, for the period of his internment, 45 months, at $80.00 per month;

2. Maintenance or subsistence during internment, for the period December 31, 1941 until October 1, 1945, at $3.75 per day, totaling $5,118.75;

3. Maintenance after repatriation, for the period October 1, 1945, until approximately April 30, 1946, at $5.00 per day, totaling $935.00;

4. War risk insurance benefits, in the amount of $5,000.00, because of personal injuries allegedly suffered during the bombing of the vessel, and internment subsequent thereto.

This brief will not discuss the matter of war bonus, it having been heretofore stipulated by and between the parties that payment or non-payment thereof shall be in accordance with the ultimate disposition of the same question heretofore considered by this court in the case of *Agnew et al. v. American President Lines, Ltd., a corporation, and United States of*

America, No. 11,943, amended opinion filed May 18, 1949, involving interned seamen ex the SS. PRESIDENT HARRISON. The said stipulation dated June 22, 1949, was filed on June 22, 1949.

Respecting maintenance or subsistence during internment, Appellant apparently seeks recovery on either of the following grounds:

1. Because he was injured during the course of his employment on the vessel; or

2. Because there is an implied provision in the shipping articles to pay maintenance for the same period of time for which wages are payable; or

3. Because there is an obligation on the part of the vessel under general maritime law to pay maintenance to her seamen after the loss of the vessel; or

4. Because the union agreement in existence at the time the articles were opened (Marine Cooks and Stewards Agreement, July 5, 1940, Section D, subsection 7) provides therefor. The agreement provides as follows (A. 4):

> "D. Section 7. When in port and subsistence is not furnished, members of the Stewards Department shall receive seventy-five cents (75¢) per meal and when quarters are not furnished one dollar fifty cents ($1.50) per day for room."

American President Lines controverts each basis upon the grounds, respectively, that Nelson was not injured aboard the vessel in the course of his employment; that there is no implied obligation to pay

maintenance for the same period as that for which wages were expressly made payable; that there is no obligation under the general maritime law to pay maintenance to seamen of a lost vessel; and that the union agreement calls only for payment of subsistence during the course of a continuing voyage. The District Court, Judge Goodman, ruled in favor of Appellee American President Lines (Respondent below) in regard to non-payment of maintenance or subsistence.

Respecting maintenance after repatriation Appellant seeks recovery on the basis that he was injured during the course of his employment aboard the vessel and was still in need of treatment following his repatriation. American President Lines controverts the claim, and the District Court ruled in favor of Appellee American President Lines (Respondent below) in this regard.

Respecting war risk insurance benefits in the amount of $5,000.00, because of personal injuries allegedly suffered during the bombing of the vessel, or internment thereafter, Appellant contends that the rider to the shipping articles required American President Lines to provide comprehensive and all inclusive war risk insurance covering injuries, internment, and death. The rider provides as follows (A. 36):

> "8. War risk insurance in the sum of $5,000.00 shall be furnished to members of the crew on this voyage in accordance with Agreements with Unions shown above."

American President Lines controverts this claim on the basis that the rider to the shipping articles and the applicable union agreement required Appellee American President Lines to provide war risk insurance covering death only, and that such insurance was actually procured; and on the further basis that in any event Appellant did not incur any injuries at the time of the bombing of the vessel, or as a direct or proximate result thereof.

III.

STATEMENT OF THE EVIDENCE.

We briefly summarize the evidence presented to the District Court, as follows:

A. *For Appellant* (Libelant below):

Dr. Guterman, who examined Nelson during December, 1946, testified regarding various disabilities of the right wrist, right leg and ankle, and lower back (A. 119), and generally attributed the disabilities, on the basis of Nelson's history (A. 118), to trauma, although he was unable to state whether the healed fractures of wrist and ankle were five or ten years old (A. 131). He further stated that he was initially puzzled respecting the disability of the right leg (A. 125), so secured an abstract from the San Francisco Marine Hospital's clinical record regarding Nelson (A. 126), which revealed the disability could be attributed to paralysis following hemorrhage in the brain (A. 126, 127). A report was procured from the Army's 142nd

General Hospital, Calcutta, which revealed that Nelson had suffered paralysis involving his right leg, cause undetermined (A. 127). Dr. Guterman suggested four possibilities as the cause for Nelson's disabilities: Trauma, pressure on a nerve, brain hemorrhage, syphilis (A. 128). He had not originally considered vascular (hemorrhagic) causes because Nelson had not mentioned these matters to him. (A. 132).

Appellant, *Philip Nelson,* testified that during the bombing of the vessel he and other seamen, including Chief Mate Cox, were some four decks below the main deck (A. 141), when a bomb fell into the area, tearing up the vessel and causing injury to his right wrist, right ankle, and back (A. 142). He left the area, jumped overboard, and was picked up by the Master's lifeboat (A. 143). He received no treatment at Tarakan or Balikpapan, stops en route to Soerabaya (A. 158), and neither asked for nor received any treatment at Soerabaya because "I was tired and did not want to go to the hospital; * * *" (A. 145). At some later date, however, because he could not walk (A. 145), he called in a doctor who had him hospitalized (A. 159). A cast was put on his leg in the hospital and he remained there about two weeks before the Purser came to see him (A. 146). A cast was put on his hand after the Japanese occupied Soerabaya some time in March, 1942, some two months after the bombing of the vessel (A. 146, 147). The purser had made advances of money to Nelson by coming to Nelson's room (A. 160) prior to being hospitalized.

B. *For Appellee American President Lines* (Respondent below):

John Conway, Purser ex the SS. RUTH ALEXANDER, testified that all the crew members assembled on "D" deck at the time of the bombing (A. 174); that a bomb exploded on the deck above, collapsing a staircase, blowing out the lights, and injuring four seamen, but that the first time he heard of Nelson's allegedly having been injured was when the present suit was filed (A. 176). Special care was taken of injured seamen on the rescuing plane, but Nelson was not among the injured so cared for (A. 177, 178); nor was Nelson among those cared for at Balikpapan (A. 178); nor was he hospitalized at Soerabaya upon arrival (A. 179). Licensed personnel were quartered in one hotel, the majority of unlicensed personnel in another hotel, and several others, including Nelson, in a rooming house (A.180). Conway made cash advances on numerous occasions (A. 161) during the three weeks the seamen were in Soerabaya before their departure, payments being made at the crew's hotel (A. 180), and Nelson was not paid at his rooming house, but at the hotel (A. 181), the final payment being on January 23, 1942 (A. 161). A crew member informed Conway something had happened to Nelson, so Conway went to Nelson's room and found him in bed, unconscious (A. 182, 183). Nelson was then hospitalized (A. 183). Conway visited the hospital three times (A. 183, 194); the first two times, however, Nelson was unconscious, but the third time Conway spoke to Nelson, telling him the doctors said he was not physically

fit to travel with the balance of the crew who were being repatriated (A. 184). Conway did not at any of his three visits see any open wounds, scars, or casts on Nelson (A. 220, 221, 223). The official log of the vessel, dated January 27, 1942, written up by Conway, states that Nelson was left at Soerabaya, the doctors having pronounced him unfit to travel (A 187).

Joseph Cox, Chief Mate ex the SS. RUTH ALEXANDER, testified that he was with the crew at the foot of the vessel's main staircase at the time of the bombing (A. 226); that to his knowledge Nelson was not injured in the bombing, although four other seamen were (A. 227); that Nelson was not among the injured cared for at Tarakan or Balikpapan nor was he among those hospitalized on arrival at Soerabaya (A. 227, 232). He saw Nelson on several occasions walking about during the three weeks the crew were at Soerabaya before being repatriated, and that there appeared to be nothing the matter with him (A. 227, 228, 232). As an incident to ship's business he knew that Nelson was hospitalized several days before January 24, 1942, when Cox was repatriated (A. 228, 229), but does not know of any treatment given Nelson (A. 230). The crew members given treatment were those observed by or reported to Cox as having been injured (A. 230, 231, 232).

Frederick Willarts, Master ex the SS. RUTH ALEXANDER, the only witness whose testimony was given by deposition, stated that after the bombing of the

vessel Nelson jumped into the water from the vessel, a distance of about 12 feet, and was pulled into the Master's life boat (A. 240, 241, 253); the Master inquired of Nelson respecting the existence of any injuries, and was informed by Nelson "I'm all right; I'm going to pull the oar", which he did (A. 240, 256); Nelson had no outward injuries, nor did he complain while in the lifeboat of any injuries (A. 240, 255, 256). There were four seamen out of a total of forty-eight who were treated at Tarakan, Balikpapan, and Soerabaya, and Nelson was not among them, nor did Nelson or anyone else ever report that Nelson was allegedly injured in the bombing (A. 242, 243, 244, 254, 256, 257, 258). After arrival at Soerabaya the seamen were housed in various places, as available (A. 244), and Nelson was seen thereafter for at least two weeks walking about the city, having no apparent difficulty with his leg or ankle (A. 259). On or about January 18 or 19, 1942, the Master and the Purser went to the place where Nelson was staying (A. 245, 246), found Nelson was ill, and had him transferred to a hospital (A. 247, 252), this transfer occurring perhaps a week before the balance of the crew departed from Soerabaya (A. 248). The Master was informed on January 27, 1942, that the hospital's doctors had pronounced Nelson unfit to travel, and a notation to that effect was made in the ship's logbook (A. 248, 249, 260), the Master further stating that Nelson, while in the hospital, looked physically all right, but had an expression like a drunken man going wild (A. 250), counsel for Nelson eliciting on cross-

examination that the hospital's doctors reported that Nelson had been drinking too much (A. 254).

Dr. Rodney A. Yoell, Chief Surgeon for American President Lines, testified that he examined Nelson on November 17 and 18, 1947, Nelson at that time complaining of pain in the right foot and right instep (A. 189), but making no complaint respecting his right hand or right arm (A. 189) nor respecting his back (A. 199). Nelson had been drinking at the time of both examinations (A. 190, 197). Dr. Yoell found from his examination that Nelson had venereal disease (A. 190), although Nelson stated he had never had any venereal disease (A. 196). Reference, while on the witness stand, to clinical records from the San Francisco Marine Hospital and the Army's 142nd General Hospital at Calcutta, revealed that both Kahn and Wasserman tests during 1945 were positive for the existence of venereal disease (A. 190, 191). Although a small scar was founnd on the foot, x-rays did not reveal evidence of a prior fracture (A. 190, 198). Dr. Yoell's diagnosis respecting the right leg was of an old hemiplegia (paralysis) of unknown cause (A. 192, 204), although trauma could have caused the condition (A. 203, 204). A clot on the brain or trauma were equally logical explanations of the leg condition (A. 205). People with venereal disease, who indulge in alcohol, are prone to vascular (hemorrhagic) dissturbances (A. 195). Nelson's back was examined, but no limitation of motion was noted, nor any hypertension or guarding action of the back muscles (A. 199, 202).

In connection with the foregoing matters *Appellant* (Libelant below) again took the stand on his own behalf and testified that he had reported the injury to his foot to the Chief Steward and to the Purser (John Conway), but had asked the Purser not to report the condition because Nelson did not want to be hospitalized and left behind in Soerabaya (A. 275, 277). It was not until his foot allegedly became swollen that the Purser secured medical aid (A. 225). The Chief Mate, Mr. Cox, also knew of Nelson's having been injured, but, according to Nelson, "he wouldn't say anything about it today * * *" (A. 276). Nelson further testified "I have just been double-crossed all the way around" (p. 276). In answer to questions by Judge Goodman Nelson admitted that during the two weeks or more he was in Soerabaya following arrival and before being hospitalized he walked around on various occasions, "trying to exercise the foot" (A. 276, 277).

E. C. Kester, Manager of American President Lines Insurance Department, gave testimony concerning the matter of war risk insurance protection, stating that he was familiar (A. 262) with Paragraph 8 of the rider to the shipping articles (A. 36) which provided:

> "8. War risk insurance in the sum of $5,000 shall be furnished to members of the crew on this voyage in accordance with agreements with Unions shown above."

Kester procured a Lloyd's policy which provided that unlicensed seamen were covered against loss of life only (A. 263), but that the policy covered licensed

personnel for injuries as well as death (A. 264). The collective bargaining agreement dated July 5, 1940, with the Marine Cooks and Stewards union, as referred to in the contract, did not contain anything respecting war risk insurance, but the Supplement dated October 10, 1941, did so provide (A. 266, 273) as follows:

> "Section 4. War risk insurance in the sum of $5,000 shall be furnished to members of the crew of vessels on voyages provided for in this agreement."

Over objection by Nelson's counsel the union agreement effective August 16, 1941, with the Masters, Mates and Pilots, was introduced into evidence (A. 270), Paragraph 5 of said agreement providing as follows:

> "(5) War risk insurance of $5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of $5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than $5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies shall be made available for inspection at the offices of the respective companies."

Discussion was had between counsel for the parties and the Court respecting Paragraph 7 of the rider to the shipping articles (A. 35) and Section 4 of the Marine Cooks and Stewards' supplementary union agreement dated October 10, 1941, calling for reimbursement of crew members in the amount of $150.00 in the event of loss of personal effects from war risks (A. 273).

Such evidence as may be pertinent to the issues involved will be further considered in relation to each issue in turn.

IV.

ARGUMENT.

The only real issue is one of fact respecting whether or not Appellant was injured during the course of the bombing of the vessel, or as a direct or proximate result thereof. If Appellant was not so injured he is not entitled to a recovery upon any of the causes alleged.

A.

THE FINDINGS OF FACT BY THE DISTRICT COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE NOT CLEARLY ERRONEOUS, AND HENCE SHOULD NOT BE DISTURBED ON APPEAL.

It is recognized that although an appeal in admiralty opens the case for a trial *de novo,* findings of fact by the District Court are entitled to the greatest

weight. This Court has repeatedly stated that where the findings are supported by substantial evidence and are not clearly erroneous, the findings should not be disturbed.

Heder v. United States, 167 F. (2d) 899 (C.A. 9);

Bornhurst v. United States, 164 F. (2d) 789 (C.A. 9).

In this case all witnesses (except Frederick Willarts, Master, whose deposition was read on behalf of Appellee American President Lines), namely, two for Appellant (Libelant below) and five for Appellee American President Lines (Respondent below) testified in open court. This Court has ruled, under such circumstances, as follows:

> "In an appeal in admiralty, where 'a substantial part of the evidence was heard in open court', the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttal presumption of correctness.' Thomas v. Pacific S. S. Lines, Ltd., 9 Cir., 84 F. (2d) 506, 507, 508; The Pennsylvania, 9 Cir., 149 F. (2d) 478, 481. And, 'where all of the evidence is heard by the trial judge and the question is one of credibility of the witnesses on conflicting testimony, the presumption [that the findings of the District Court are correct] has very great weight.' "

Tawada v. United States, 162 F. (2d) 615 (C. A. 9).

See also:

United States v. Lubinski, 153 F. (2d) 1013 (C.A. 9).

The reasons for such rulings are sound and need no recapitulation. Abrogation of the rules and the reasons behind them, as proposed by Appellant, is no more warranted in a seaman's case than it would be in any other case.

B.

APPELLANT IS NOT ENTITLED TO MAINTENANCE OR SUBSISTENCE DURING INTERNMENT FOR THE FOLLOWING REASONS.

1. The District Court found that Appellant was not injured during the course, nor as a proximate result, of his employment aboard the vessel;

2. The District Court ruled that the applicable union agreement provided only for subsistence during the course of a continuing voyage;

3. This Court has ruled that when a vessel is lost there is no obligation under the general maritime law to pay her uninjured seamen maintenance thereafter;

4. This Court has ruled that maintenance, although a form of compensation to seamen, is not part of their wages, and is not payable for such time as the express terms of the shipping articles may require as to wages.

1. Specifically, the District Court found (Finding of Fact No. 6, A. 92): "Libelant suffered no injury or injuries in the service of the ship prior to, at the time of, following, or as a direct or proximate result of the bombing of the vessel." The District Court further found (Finding of Fact No. 7, A. 92):

"Libelant was not repatriated to the United States with the balance of the crew because of incurring a disability approximately three weeks after the destruction of the vessel, the disability being brought on in part, by libelant's own misconduct while at Soerabaya * * *. The disability preventing libelant's repatriation was neither caused by nor in any way connected with libelant's service aboard said vessel, nor did the bombing of the vessel bear any proximate relationship to the onset of said disability."

These findings were based upon consideration of all the evidence presented to the District Court by the witnesses called by both parties. The findings reflect the District Court's opinion and estimate of the integrity and reliability of those witnesses as each man appeared on the witness stand to give his testimony, and clearly indicates the District Court believed that Nelson did not sustain a fracture of his right foot or his right wrist, nor any other of his alleged injuries at the time of the bombing of the vessel. Otherwise how explain the uncontradicted testimony that Nelson took an oar in the lifeboat, that he requested no aid at Tarakan, Balikpapan, or Soerabaya, and that he was observed walking about Soerabaya for two weeks or more after arrival at that port, all without any apparent difficulty? We believe that Nelson's apparent fortitude in the face of his alleged adversity was discounted by the District Court upon the basis of the oral testimony and documentary evidence respecting the onset of a paralytic stroke (hemiplegia) of the right side, probably re-

sulting from a brain hemorrhage, suffered fully three weeks after the bombing, and bearing no causal connection thereto, together with such other misfortunes to his wrist and foot as may thereafter have befallen him during his internment. There were certainly no signs of any injury of the Appellant's head to account for the hemorrhage suffered. The testimony of the Master, Chief Mate and Purser shows that the disabilities of wrist and ankle must have occurred some time during Appellant's internment since the disabilities were not known to have been incurred at the time of the bombing of the vessel, nor at any time thereafter and prior to their departure from Soerabaya. It should be remembered in this regard that Nelson did not tell Dr. Guterman, his own doctor, of the paralytic stroke, and that Dr. Guterman confessed his inability to ascribe a cause to the condition of the right leg until furnished with copies of prior clinical records which included Nelson's own case history respecting the brain hemorrhage and paralysis. The existence of venereal disease, coupled with alcoholic indulgence, renders one very prone to this type of vascular (hemorrhagic) action, as testified to by Dr. Yoell (A. 195). Nelson's indulgence in alcohol while at Soerabaya is neither contradicted nor diminished by any showing that others of the crew similarly indulged.

So far as libelant's low back pains are concerned, no allegations in this regard were made by libelant in either his original or in the amended libel. Nor did he assert any complaint in this regard to Dr.

Yoell at the time of his examination of libelant, and Dr. Yoell found no such muscle spasms, restrictions of movement, or other mild disorders such as were set forth by Dr. Guterman. Under the circumstances we believe that libelant's low back pains, if he has any, are attributable to his stroke, to the psychoneurosis noted by the United States Marine Hospital at San Francisco, and to libelant's history of syphilis and alcoholism.

The District Court very properly concluded that Nelson suffered no injuries in the service of the vessel as a direct or proximate result of the bombing. Appellant urges that all the testimony contrary to his own must be disregarded, and the stamp of veracity and probability placed upon his improbable testimony. This the District Court refused to do. We do not think this Court may properly rule under the circumstances that the District Court's findings are clearly erroneous and not supported by substantial evidence.

2. The District Court further ruled that the applicable union agreement calls for subsistence only, not maintenance as that word is understood when we speak of the maritime right of seamen to maintenance and cure, during the course of a continuing voyage. [Finding of Fact No. 17 (A. 96); Conclusion of Law No. 2 (A. 99).]

Appellant does not discuss the matter except to cite the union agreement (App. brief. p. 50). The short answer to his contention in this regard may be

found in the District Court's opinion on the identical point raised in the case involving the seamen ex the SS. PRESIDENT HARRISON, *Agnew v. American President Lines, Ltd. et al.,* 73 F. Supp. 944 at 951. The decision respecting maintenance was affirmed by this Court in its amended opinion filed May 18, 1949 (Case No. 11,943).

3. Assuming that Appellant was not injured in the service of the vessel, there exists no implied contract under the general maritime law to pay him maintenance while ashore merely because the vessel was lost. The point was established by this Court in its decision in the case of *Agnew v. American President Lines, Ltd. et al.,* case No. 11943, per amended decision dated May 18, 1949. We do not intend to further labor the question respecting the fact that Appellant was not injured in the service of the vessel. The legal point follows as a matter of course.

4. In like manner it follows, from this Court's decision in the *Agnew* case, that payment of maintenance during internment, again assuming non-injury, is not concurrent with payment of wages which were agreed to be and were paid under the shipping articles. In the words of this Court in the *Agnew* case, involving the same question:

> "Wages constituted one kind of ship's obligation to the sailors. Maintenance is another kind."

C.

APPELLANT IS NOT ENTITLED TO MAINTENANCE FOLLOWING REPATRIATION FOR THE REASON THAT THE DISTRICT COURT FOUND APPELLANT WAS NOT INJURED DURING THE COURSE, NOR AS A PROXIMATE RESULT, OF HIS EMPLOYMENT ABOARD THE VESSEL.

The facts respecting whether or not Appellant was injured during the course, or as a proximate result, of his service aboard the vessel have been heretofore discussed in connection with the question of maintenance during internment, and need not be further reviewed. If Appellant is not entitled to maintenance during internment he is not entitled to maintenance thereafter. Moreover, reference to the clinical abstract from the San Francisco Marine Hospital (Respondents' Exhibit "A"), discloses that Appellant was an in-patient for the period November 10—November 24, 1945, at which latter date he was discharged, except that out-patient treatment for venereal disease was recommended. Appellant explains his failure to secure employment until April 30, 1946, on the ground that he was "weak." (A. 152.) We submit that if Appellant was discharged from the Marine Hospital as fit for duty except for the necessity of treatment for venereal disease, he is not entitled to anything by way of maintenance following such discharge, nor, of course, during the time he was an in-patient.

Calmar Steamship Corp. v. Taylor, 303 U.S. 525, 531, 82 L. Ed. 993, 998, 58 S. Ct. 651.

We note Appellant has a further argument (App. Brief, p. 58) to the effect that "The imprisonment necessarily flowed from his service to the vessel, and

the hospitalization and subsequent convalescing period were directly related to that service." Appellant, in so arguing, disregards all the evidence and the finding of the District Court (Finding of Fact No. 7, A. 92) to the effect that Appellant's internment directly resulted from the fact that he alone, of the forty-eight seamen, was not repatriated during January, 1942, because of being hospitalized due to the occurrence of a brain hemorrhage and resulting hemiplegia (paralysis of the right side), fully three weeks after the loss of the vessel. Medical testimony respecting the concurrence of venereal disease and alcoholic indulgence as a cause of the hemorrhage should not be so lightly discounted. Appellant would have American President Lines held liable for payment of maintenance following loss of the vessel solely because of the onset of some disability while the seaman was awaiting repatriation, which disability bears no proximate causal relationship to any employment in the service of the vessel. As pointed out by this Court in its decision in the *Agnew* case:

> "No authority is cited for such a proposition and the contrary inference is to be drawn from Alaska S. C. Co. v. United States, 290 U.S. 256, 262."

D.

APPELLANT IS NOT ENTITLED TO ANY SUM BY WAY OF RECOVERY UNDER THE COMMERCIAL WAR RISK INSURANCE POLICY FOR THE FOLLOWING REASONS.

1. The rider to the shipping articles and the applicable union agreement required American

President Lines to provide war risk insurance covering death only, and such insurance was actually procured;

2. Even assuming that the rider to the shipping articles and the applicable union agreement required American President Lines to provide war risk insurance covering disability as well as death, Appellant did not incur any disability as a result of war risks at the time of the loss of the vessel.

1. Respecting the obligation on the part of Appellee American President Lines to provide war risk insurance to Appellant we wish to first dispose of the matter of Appellant's argument respecting the Findings of Fact and Conclusions of Law, as urged in his brief at pages 64a, 65 and 66. The position of American President Lines at the trial was that originally set forth in its Answer to the second cause of action in the First Amended Libel (A. 50), namely, that the rider to the shipping articles required the American President Lines to furnish war risk insurance to members of the crew in accordance with the agreements with the various maritime unions, and that war risk insurance was accordingly provided, covering death only, such coverage being all that was required. The testimony of Mr. Kester, Manager of American President Lines Insurance Department, and the colloquy between the District Court and counsel for the respective parties (A. 261-274) clearly establishes that at no time did American President Lines concede any obligation to provide war risk insurance respecting anything but death. The Order

for Decree by the District Court upheld American President Lines' position (A. 85, 86), and directed appropriate Findings of Fact and Conclusions of Law to be prepared. Counsel for American President Lines complied with the Order, but admits that it erred in preparation of Findings of Fact No. 19 (A. 96), in that said Finding used the word "injuries" instead of the word "death". That such was an unintentional error we believe is shown by the fact that Conclusion of Law No. 5 (A. 99), also prepared by counsel for American President Lines, states:

> "5. Respondent American President Lines, Ltd. fully complied with its obligations respecting the procurement of war risk insurance."

There was an error made, but, we submit, there was no intentional abandonment of its position by the American President Lines respecting the type of war risk insurance that was to be provided the crew, nor, we assure this Court and counsel for Appellant, any uncertainty of position. We do not understand that Appellant has been prejudiced in any respect in this regard.

It may be further pointed out that Finding of Fact No. 19 (A. 96) actually supports the second ground set forth by the District Court in its Order for Decree (A. 85, 86):

> "As to the cause of action against American President Lines, Ltd. alleged to arise out of the agreement to furnish war risk insurance, I am of the opinion, first—that the type of war risk insurance, which the documentary evidence demonstrates respondent was obligated to furnish,

> does not afford libelant a claim for insurance; secondly—that even if such obligation existed, libelant did not suffer any injuries thereunder compensable".

The "obligation" referred to by the Court in the second ground means the obligation alleged by Appellant, namely, to furnish war risk insurance covering the crew for both injuries and death on this voyage. But the obligation was not to cover the crew after the termination of the voyage, which occurred when the vessel was lost, and since the District Court found Nelson had not been injured as the result of a war risk, he was not entitled to recover in any event.

Assuming, as Appellant claims, that he was injured during the bombing, the question is presented as to whether he has any claim against American President Lines based on the obligation of American President Lines to provide the crew with "war risk insurance in accordance with Agreements with Unions shown above."

It is noted that Appellant still objects (App. Brief pages 60, 64) to the fact that the District Court admitted in evidence the Marine Cooks and Stewards Supplementary Agreement of October 10, 1941. Frankly, we cannot understand the reason for the objection, because if Appellant wants to limit the finding of an obligation on the part of American President Lines to furnish war risk insurance to the crew to such obligation as may be imposed by Paragraph 8 of the rider, he is cutting the ground from beneath his feet. The language of the

rider says that war risk insurance is to be furnished "in accordance with Agreements with Unions shown above." The agreement with the Marine Cooks and Stewards union referred to is that of July 5, 1940, and it contains nothing respecting war risk insurance. If there was no agreement with the union, there was no obligation under the rider, for the existence of the obligation depended upon the existence of an agreement with the union. There is no other way to explain and give effect to the words in the rider "in accordance with * * *". If it be contended that the rider alone contains all of the terms of the contract between the crew and shipowner, then the words "in accordance with Agreements with Unions shown above" must be given no meaning at all.

It should be pointed out, in this regard, that the obligation to furnish war risk insurance to the crew was not inserted in the rider purely as a gratuity on the part of shipowners, but came as the result of insistent union demands therefor, which demand by the Marine Cooks and Stewards and agreement by shipowners is set forth in the Supplementary Agreement of October 10, 1941. There seems nothing incongruous or illegal (46 U.S.C., Sec. 564, subsection 8) about making reference in the rider to the various Agreements in order to measure the extent of the obligation. It is common in contracts to thus make reference to other existing written obligations or agreements between parties, nor does this appear to be in conflict with the provisions of 46 U.S.C., Sec. 676, to the effect that the shipping articles "shall be deemed to contain all the conditions of contract with the crew

as to their services, pay, voyage, and all other things." To require insertion in the shipping articles of the multitude of conditions whereby the seamen from six separate unions consent to be employed would be an absurdity, so reference to the conditions, such as war risk insurance, is made in the rider. In other words, the shipowner agrees with the various unions to provide war risk insurance under certain conditions, and the agreement is reduced to writing. The rider to the shipping articles confirms the existence of the agreement without spelling out in each of six instances the conditions of the obligation, handling the matter by the simple proviso that the existence and conditions of the obligation shall be "in accordance with Agreements with Unions shown above."

Paragraph 4 of the Marine Cooks and Stewards Supplement dated October 10, 1941, effective August 16, 1941, provides:

> "War risk insurance in the sum of $5,000. shall be furnished to members of the crews of vessels on voyages provided for in this Agreement."

The voyages provided for were those commencing on or after August 16, 1941, which would include that voyage of the SS. Ruth Alexander, which departed from San Francisco on October 23, 1941, for a trans-Pacific trip and return, during the course of which voyage the vessel was destroyed on December 31, 1941.

Appellant contends that there is nothing in the rider, and, we infer, in the union agreement, limiting the type of "war risk" insurance to be procured by American President Lines, and asserts that insurance

covering any and all war risks should have been procured. Appellant objected at the trial to American President Lines introducing any evidence respecting the mutual intention of the contracting parties with regard to the type and extent of insurance agreed upon, Appelant urging that the wording of the rider and union agreement was clear and broad, and no evidence was needed or called for in explanation thereof. We disagreed both then and now.

The rights of the parties rest upon contract. Each party finds in the rider and the union agreement something different. Appellant states that American President Lines cannot show what meaning was ascribed to the words "war risk insurance" by the contracting parties because there exists neither uncertainty nor ambiguity in scope or definition thereof, nor are there any limitations thereon. It should be noted that the wording of the rider, which Appellant desires to have construed against American President Lines, is identical with the wording of the union agreement, which was written by representatives of both union and shipowner.

We look, as we have every right to do, to the meaning given the words "war risk insurance", as indicated by the usage and action of the contracting parties. It has always been our thought that contracts are to be interpreted so as to give effect to the mutual intention of the parties (Cal. Civil Code Sec. 1636), and with this we hope Appellant agrees. If the contract is written, as in our case, the intention will be ascertained from the writing, if possible (Cal. Civil Code, Sec.

1639). We challenge the ability of Appellant to render certain, and to define the meaning of the words "war risk insurance" without reference to the circumstances under which the contract was made.

We call the Court's attention to the fact that according to Appellant's contention the term would include insurance against loss of personal property due to a "war risk". Yet the contracting parties did not think so, for they made special provision in the same section of the agreement dealing with war risk insurance, and in Paragraph 7 of the rider (A. 35, 36), for direct reimbursement for loss of personal effects. We think it quite obvious that the parties thereby clearly indicated that the words "war risk insurance" did not have the wide scope now urged by Appellant.

In like manner the contracting parties were aware of the state of the maritime law respecting a vessel's obligations for maintenance and cure for seamen falling sick or being injured while in the service of the ship. Appellant would have us now believe that the parties contracted for a double recovery by the seamen from the vessel owners.

The fact that Appellant seeks recovery in the alternative against either the United States or American President Lines would appear to us to be the best evidence of the uncertainty which exists in the mind of Appellant's counsel in connection with whether the words "war risk insurance" (once known to encompass only the type of insurance procured) can be rendered, through lapse of time and present representa-

tions, more encompassing than was ever contemplated by either of the parties at the time of contracting.

The questioned words are not of themselves absolute, unambiguous, and certain, being words which may be used by different parties with different connotations and to express different ideas. As such we can and should refer to the circumstances (Cal. Civil Code Sec. 1647) under which the present parties contracted; the whole of the contract (Cal. Civil Code Sec. 1641) entered into, including the special provision for loss of personal effects; and to the special meaning given the words (Cal. Civil Code Sec. 1644) by the parties themselves, as evidenced by usage and the entirely separate (but entirely consistent) acts of the parties themselves thereunder, American President Lines in procuring insurance against loss of life, and counsel for Appellant in seeking to have Appellant given war risk insurance by the United States against personal injuries, retroactive to October 1, 1941, prior to the effective date of the rider to the articles, which rider is now asserted to so clearly provide for insurance against personal injuries due to war risks.

In order to ascertain the true meaning of the words "war risk insurance" the District Court made reference not only to the rider and the Marine Cooks and Stewards Supplementary Agreement, but also to the Supplementary Agreement, dated October 10, 1941, entered into between the Masters, Mates, and Pilots and the shipowners (A. 270), the provision therein respecting the type of war risk insurance to be provided having been set forth above. We believe this was

properly done by the District Court as a guide to an interpretation of the meaning of the words "war risk insurance * * * in accordance with Agreements with Unions * * *", and the latter Agreement clearly indicated the meaning of the words "war risk insurance" were not meant to have the universal and all inclusive significance ascribed to them by Appellant.

2. Even assuming that the rider to the articles and the applicable union agreement required American President Lines to provide war risk insurance covering disability (as well as death) from war risks, Appellant did not sustain any disability as a result of war risks at the time of the loss of the vessel, or as a direct or proximate result thereof.

Appellant contends (App. Brief, pages 63, 64c, 66) that the policy of war risk insurance should have covered any kind of injury, disability, or loss suffered as a result of war risks, such injury, disability or loss to include internment.

First of all, any insurance procured was to be applicable "on this voyage" (according to the rider to the articles) and "on voyages" (according to the union agreement). And we do not understand Appellant contends that the voyage did not conclude upon the sinking of the vessel.

Agnew v. *American President Lines, Ltd. et al.*, 73 F. Supp. 944, 951.

Appellant suffered no injuries from war risks during the course of the voyage, and we do not propose to further elaborate on the matter. Appellant's con-

tention that events occurring after the termination of the voyage were also covered is not sustained by any provision of the rider nor by the applicable union agreement.

The matter of the extent of the shipowner's liability to the Appellant in the event of internment was covered by other provisions of the rider to the articles respecting wages, which were paid, and war bonus, the ultimate payment or non-payment of which is subject to prior stipulation between the parties.

If American President Lines had procured no insurance whatsoever for the crew of the vessel, and the seamen sought to have the provisions of the shipping articles and of the union agreement specifically enforced in connection with procurement of "war risk insurance", a Court would be hard pressed to determine from those words alone the type and scope of insurance that should be procured.

Rest. of Contracts, Sec. 32, 370;
Cal. Civil Code, Sec. 3390, subdiv. 6.

Although the wording of the rider to the shipping articles and of the union agreement is not certain with regard to the scope of the insurance to be procured, and the contract in this respect could be viewed as too uncertain for enforcibility, still where the parties' actions thereunder indicate that certainty existed as to their obligations despite the wording of the contract, then the Court should not be called upon to impose greater obligations upon one of the parties than were

originally contemplated by the parties themselves, the wording of the contract having been rendered certain by the actions of the parties thereunder.

Even if American President Lines had contracted to provide a policy of war risk insurance which covered, in addition to loss of life, injuries as well, still the coverage was to exist only on the "voyage", and libelant's injuries occurred three weeks after the end of the voyage, and were not within the period of coverage.

Libelant's injuries, paralysis, hemorrhage, and the like, not only occurred after the voyage was over, but were not occasioned by "war risks", occurring rather by reason of causes entirely distinct therefrom. His internment resulted from his inability to travel after a paralytic stroke, not because of the bombing of the vessel, nor as a result of any service for the vessel.

V.

CONCLUSION.

Appellee American President Lines believes that the only real issue in this case is one of fact, namely, whether or not Appellant was injured during the course of the bombing of the vessel, or as a direct or proximate result thereof. Appellant had his day in the District Court, and failed to convince that Court of the truth of his allegations. Upon that ground Appellee American President Lines submits that there exists

no basis in the facts or in law for a different ruling herein from that of the District Court.

Dated, San Francisco, California,
June 27, 1949.

Respectfully submitted,
TREADWELL & LAUGHLIN,
EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Proctors for Appellee,
American President Lines, Ltd.

CHARLES M. HAID, JR.
Of Counsel

(Appendix A Follows.)

Appendix A.

Appendix A

Rules of Construction

California Civil Code, Section 3390, subdivision 6:

"3390. *What cannot be specifically enforced.* The following obligations cannot be specifically enforced:

* * * * * * *

"6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

California Civil Code, Section 1636:

"1636. *Contracts, how to be interpreted.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

California Civil Code, Section 1639.

"1639. *Interpretation of written contracts.* When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however to the other provisions of this title."

California Civil Code, Section 1641:

"1641. *Effect to be given to every part of contract.* The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

California Civil Code, Section 1644:

"1644. *Words to be understood in usual sense.* The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

California Civil Code, Section 1647:

"1647. *Contracts explained by circumstances.* A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."